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Nos. 82-1005, 82-1247 & 82-1591

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

CHEVRON U.S.A. INC., a corporation, et al.,
Petitioners,

VS.

NATURAL RESOURCES DEFENSE COUNCIL, INC.,
CITIZENS FOR A BETTER ENVIRONMENT, INC.,
NORTHWESTERN OHIO LUNG ASSOCIATION, INC.,
Respondents.

BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

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QUESTIONS PRESENTED

Did the court of appeals err in substituting its judgment for that of the Environmental Protection Agency on basic policy determinations, where the court below did not, and could not, find the regulations to be unreasonable? In particular, was it unreasonable for the Environmental Protection Agency

(1) to promulgate regulations which simply conformed EPA's regulatory definition of "stationary source" to the definition set forth in the Clean Air Act; and

(2) to promulgate regulations which the undisputed record shows comply with the Congressional purpose in enacting the Clean Air Act?[1]

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[1]Petitioners in the proceeding below were Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc.

Respondent in the proceedings below was Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency.

Chevron U.S.A. Inc. was an intervenor-respondent in the proceedings below. Chevron U.S.A. Inc. is a wholly owned subsidiary of Standard Oil Company of California, a publicly owned corporation. Standard Oil Company of California owns stock in the following publicly owned corporations:

Huntington Beach Co.
AMAX, Inc.
Cetus Corp.

Intervenor-respondents in the proceedings below, other than Chevron U.S.A. Inc., are listed in Appendix D to Chevron's Petition for a Writ of Certiorari, No. 82-1005.

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BRIEF FOR PETITIONER CHEVRON U.S.A. INC.

OPINIONS BELOW

The opinion and the judgment of the court of appeals for the District of Columbia Circuit ((D.C.Cir. 1982) 685 F.2d 718) is printed in Appendix A to Chevron's Petition for a Writ of Certiorari, No. 82-1005. The orders of denial of rehearing en banc are printed in Appendix B to Chevron's Petition for a Writ of Certiorari.

JURISDICTION

The opinion and the judgment of the court of appeals were filed and entered on August 17, 1982 (Chev.Pet., Appx. A), and its orders denying rehearing were filed and entered October 27, 1982 (Chev.Pet., Appx. B). Petitioner

Chevron U.S.A. Inc. filed its petition for a writ of certiorari on December 15, 1982. This Court has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

STATUTORY PROVISIONS INVOLVED

This case involves §§ 110, 111, 171, 172 and 173 of the Clean Air Act (42 U.S.C. §§ 7410, 7411, 7501, 7502, 7503), the pertinent provisions of which are set forth in Appendix C to Chevron's Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

The Clean Air Act and EPA's regulations

The Clean Air Act establishes a comprehensive Federal-state-local program to control existing and new sources of air pollution (Chev.Pet., Appx. A, p. A-4). Pursuant to the Act, the Environmental Protection Agency ("EPA") has prescribed national ambient air quality standards sufficient to protect the health and welfare of all citizens (42 U.S.C. § 7409(b)). The Act and elaborate EPA rules require all states to adopt, and submit to EPA for approval, State Implementation Plans for attaining those standards (Chev. Pet., Appx. A, pp. A-4 to A-5).

The 1977 amendments to the Clean Air Act, among other things, specifically mandated that the states establish permit programs "for the construction and operation of new or modified major stationary sources" in nonattainment areas, that is, areas which have not yet met one or more of the national ambient air quality standards (Chev.Pet., Appx. C, p. C-28; 42 U.S.C. § 7502(b)(6)). Under the 1977 amendments, no major stationary source may be constructed or major modification undertaken unless the state has demonstrated to EPA that its comprehensive implementation plan, of which the permit program is only one

part, assures reasonable further progress toward meeting Federal standards in the nonattainment area involved (Chev.Pet., App. A, p. A-8; 40 C.F.R. § 52.24). If the nonattainment area has no EPA-approved plan, the Act requires a construction moratorium—no major stationary source may be constructed or major modification undertaken in the area if it will emit the "nonattainment" pollutant (Chev.Pet., App. A, p. A-8; 42 U.S.C. § 7410(a)(2)(I)).

On October 14, 1981, EPA adopted a plantwide definition of "stationary source" for permit programs in nonattainment areas (Chev.Pet., Appx. A, p. A-11; 46 Fed.Reg. 50766 (Oct. 14, 1981)). Under that definition, a "stationary source" is defined as "any building, structure, facility, or installation" (40 C.F.R. §§ 51.18(j), 52.24(f); 46 Fed.Reg. 50771 (Oct. 14, 1981)).

Previous EPA regulations, adopted in August, 1980 and repealed on October 14, 1981, had defined "installation," and accordingly, "stationary source," to include not only a plant, but also each individual piece of equipment at a plant (45 Fed.Reg. 52,746 (Aug. 7, 1980)). This "dual definition," however, posed a problem for both regulators and industry in determining what pieces of equipment constituted an "installation" or "stationary source" in a given situation (46 Fed.Reg. 50768 (Oct. 14, 1981)). More seriously, the dual definition discouraged replacement of older, dirtier industrial processes with new, cleaner ones (46 Fed. Reg. 50766 (Oct. 14, 1981)). In areas subject to the construction moratorium, for example, a plant could not modernize if any of the new pieces of equipment involved in a modernization would produce emissions above de minimis levels, even if the modernization as a whole would actually decrease emissions from the plant (46 Fed.Reg. 50768 (Oct.

14, 1981)). Accordingly, EPA decided to replace the dual definition with a plantwide definition of "stationary source."

Under the plantwide definition, a modification would be subject to the construction moratorium or permit requirements applicable to "major modifications" of "stationary sources" only if the net emission increase from the plant as a whole would be above the statutory or regulatory triggers (Chev.Pet., Appx. A, p. A-11, n. 26). Modifications which did not increase plantwide emissions above statutory or regulatory de minimis levels would not be treated as "major modifications" (Chev.Pet., Appx. A, p. A-11, n. 26). The EPA plantwide definition thus applied the "bubble concept"—an entire plant and its emissions may be viewed as if placed under one bubble (Chev.Pet., Appx. A, p. A-2, n. 1). Under the bubble concept, air pollution regulations focus on the net effect of changes in an entire plant, rather than subjecting each individual unit or piece of equipment within a plant to the entire permit process (Chev.Pet., Appx. A, p. A-2, n. 1).

The primary reason advanced by EPA for adopting the plantwide definition is that the definition allows states greater flexibility in developing nonattainment programs, and thus complies with Congress' mandate that states have the primary responsibility for pollution control (Chev. Pet., Appx. A, pp. A-11 to A-12).[2] The bubble concept affords states flexibility by freeing the enormous time, money and other regulatory resources which would otherwise be required to conduct extensive permit proceedings for each

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[2]EPA also reasoned that regulatory complexity would be reduced because the plantwide definition of stationary source had previously been held to lawfully apply in another permit program administered by EPA under the Clean Air Act (Chev.Pet., Appx. A, p. A-11).

and every component of industrial plants (and perhaps every piece of new or modified industrial equipment) in the area. Those resources may then be reallocated to the critical aspects of air pollution control, such as controlling automobile emissions in certain states (J.A. 136-137, 165-166).

Chevron's project

Petitioner, CHEVRON U.S.A. INC. ("Chevron"), produces, refines and markets petroleum and petroleum products. Chevron has planned, designed and substantially constructed a large, high-technology modification to its refinery in the San Francisco Bay Area (J.A. 157-160). Chevron's project, permitted under the plantwide definition of source, will *decrease* emissions of all air pollutants from the refinery, and generate 1,200 construction jobs and 45 permanent jobs (J.A. 158).

The Chevron project involves construction of new, state-of-the-art equipment for producing lubricating oils. The new equipment will replace old equipment formerly used by Chevron for processing lubricating oils at the plant.[3] The various emissions from the new lube oil equipment will be completely offset by, among other things, the shutdown of the old equipment—which was installed in the late 1930's—and the accompanying increased pollution control efficiency at Chevron's plant (Feldstein Decl., Exh. B, p. 5). The Bay Area Air Quality Management District ("District")—the local agency charged under the Act and California law with regulation of emissions from industrial equipment in the

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[3]Declaration of Milton Feldstein in Opposition to Petitioner's Motion for a Stay and for other Relief Pending Review (hereinafter "Feldstein Decl."), Exh. B, p. 1.

Bay Area—has estimated that the Chevron project will reduce sulfur dioxide emissions from the Richmond plant by 45.54 pounds per hour, nitrogen oxide by 15.27 pounds per hour, carbon monoxide by 10.85 pounds per hour, hydrocarbons by 18.22 pounds per hour and particulate matter by 4.20 pounds per hour (J.A. 161). In light of the offset of emissions from the new equipment by the shutdown or modification of old equipment, the District issued a permit for the Chevron project.[4] The Hearing Board of the District, after conducting some 9 months of hearings on challenges to the propriety of issuing the permit, determined that the permit is entirely valid.[5] That decision is now final as to all parties.[6]

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[4]A copy of that permit is attached as Exhibit B to the Declaration of Milton Feldstein in Opposition to Petitioner's Motion for a Stay and for Other Relief Pending Review.

[5]The Hearing Board's order stated, in pertinent part:

> "[T]he evidence before us does not show the RLOP [Chevron's project], when constructed and operated according to the limitations of the Authority, will have any adverse effect on air quality. The emission increases associated with the operation of the new units to be built in connection with RLOP are to be offset by emission reductions due to the shutdown of the old lube oil processing units, increased incinerator temperatures at the phthalic anhydride plant at the refinery and by using the emission credits currently accrued by Chevron in its internal bank since December 20, 1977, in accordance with District Rule 2-2-205. To guard against any potential, increased emissions elsewhere in the refinery due to the operation of these new units, the District has limited the emissions from the refinery on an annual and monthly basis" (*In the Matter of the Appeal of Citizens for a Better Environment, et al., from the Grant of Authority to Construct, Application No. 27797* (Hearing Board of the Bay Area Air Quality Management District, California, Mar. 3, 1983) Order Denying Appeal, Docket No. 837, p. 12).

[6]In the proceedings before the Court of Appeals in the instant case, respondents relied heavily upon a declaration of Jeff Gabe

The proceedings below

Respondents Natural Resources Defense Council, Inc., Citizens for a Better Environment, Inc., and Northwestern Ohio Lung Association, Inc. filed a petition for review of the October 14, 1981 EPA regulations (Chev.Pet., Appx. A, p. A-12). Chevron and various other members of the industrial community intervened in support of the regulations (Chev.Pet., Appx. A, p. A-12).

The court of appeals vacated EPA's revised regulations, holding that the bubble concept is *per se* inconsistent with the Clean Air Act's nonattainment programs (Chev.Pet., Appx. A, pp. A-16 to A-18). The court of appeals announced a "bright line test"—based on two cases, *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C. Cir. 1978) 578 F.2d 319—for determining the propriety of EPA's use of the bubble concept: The concept would be mandatory in programs designed to maintain existing air quality, but per se inappropriate in programs to improve air quality (Chev.Pet., Appx. A, p. A-16). The court of appeals concluded that the bubble concept was per se inappropriate in the case at bar, and considered it unnecessary to determine whether the regulations in question

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(J.A. 167-176). It is significant that Jeff Gabe, research director of Citizens for a Better Environment (one of the respondents here), was one of the parties in the proceedings before the Hearing Board, as was Citizens for a Better Environment. The Board conducted extensive hearings to consider the arguments raised by Gabe there and repeated in his declaration filed in this case; the Board rejected all assertions that the Richmond project would have any adverse effect on air quality (supra, p. 6, n. 4). Neither Gabe nor any of the other parties sought review of the Board's findings. Those assertions, having been rejected by the Hearing Board, should be ignored by this Court.

promoted the improvement of air quality or whether the bubble concept was consistent with the language and legislative history of the Clean Air Act (Chev.Pet., Appx. A, p. A-19).

On October 27, 1982, the court of appeals denied a petition for rehearing; Judge MacKinnon voted to grant a rehearing en banc (Chev.Pet., Appx. B).

On May 31, 1983, this Court granted the petitions for writs of certiorari filed by Chevron (No. 83-1005), American Iron and Steel Institute, et al. (No. 82-1247) and William D. Ruckelshaus, Administrator, Environmental Protection Agency (No. 82-1591); the cases were consolidated (J.A. 5).

SUMMARY OF ARGUMENT

The court of appeals erroneously substituted its judgment for that of EPA on basic policy issues, even though the court below did not, and could not, find EPA's regulations to be unreasonable. This Court has recognized that where an agency's regulation adopts a "reasonable" statutory construction, the courts are precluded from substituting their judgment for that of the agency (*Train* v. *Natural Resources Def. Council* (1975) 421 U.S. 60, 87). The court of appeals, however, prohibited EPA from using the bubble concept in nonattainment areas solely because of the court's policy judgment that the bubble concept would cause unacceptable harm to air quality. But this policy judgment of the court below is contrary to the judgment of EPA and the judgment of Congress.

The court of appeals barred EPA from using the bubble concept in areas with air pollutant levels exceeding Federal ambient standards, even though the court could not identify any provisions of the Clean Air Act which would support its decision. In fact, the EPA regulations implementing the bubble concept are entirely consistent with the provisions of the Act. The regulations in question here simply conformed EPA's definition of the term "stationary source" to the statutory provisions of the Clean Air Act; EPA defined stationary source as "any building, structure, facility, or installation," the precise definition in section 111(a)(3) of the Act. In so conforming the definition, EPA acted rationally, reasonably, and well within both the terms of the Act and its agency discretion.

The EPA regulations implementing the bubble concept are also consistent with the purposes of the nonattainment provisions of the Act. Those purposes may be ful-

filled with no adverse effect upon public health: The EPA regulations allow growth where de minimus emissions are involved and permit construction or modification of major stationary sources only where the state has demonstrated that its program meets the goals and air quality standards of the Clean Air Act.

Consistent with the purposes of the nonattainment provisions, the bubble concept affords the states flexibility by allowing them to control stationary source emissions in the most expeditious and cost-effective manner. In addition, the bubble concept furthers Congress' goals by encouraging modernization and expansion of industrial plants. The bubble concept provides an incentive for industry to modify and retire old, poorly controlled facilities and to develop effective and cost-efficient air pollution control (J.A. 128-129, 136). Under the bubble concept and the EPA regulations, for example, Chevron may replace its old lube oil equipment with new equipment which will *reduce* emissions from Chevron's plant. Chevron's project is an example of the many beneficial projects which may be halted or not initiated if the ruling below is not reversed.

I. IN HOLDING THAT EPA MAY NOT PROMULGATE REGULATIONS USING THE BUBBLE CONCEPT IN NONATTAINMENT AREAS, THE COURT OF APPEALS ERRONEOUSLY SUBSTITUTED ITS JUDGMENT FOR THAT OF EPA ON BASIC POLICY ISSUES.

This case presents a clear instance in which the court of appeals exceeded its limited scope of judicial review of an agency's administrative action. It is well settled that where EPA, or any other administrative agency, adopts regulations implementing a "sufficiently reasonable" construction of a statute, a court of appeals is precluded "from substituting its judgment for that of the Agency" (*Train* v. *Natural Resources Def. Council* (1975) 421 U.S. 60, 87).

In the case at bar, the court of appeals did not, and could not, find EPA's regulations to be unreasonable. EPA reasonably decided to adopt a plantwide definition of "stationary source" in nonattainment areas for two valid reasons: (1) to allow states greater flexibility in developing nonattainment programs, pursuant to Congress' mandate (Chev.Pet., Appx. A, pp. A-11 to A-12); and (2) to reduce regulatory complexity by adopting the same plantwide definition previously applied in another permit program administered by EPA under the Clean Air Act (Chev.Pet., Appx. A, p. 11). Yet the court of appeals vacated EPA's regulations, even though the court could not identify any provisions of the Clean Air Act which would support its decision.

The only rationale offered by the court of appeals was that its prior decisions in *Alabama Power Co.* v. *Costle* (D.C.Cir. 1979) 636 F.2d 323 and *ASARCO Inc.* v. *Environmental Protection Agcy.* (D.C.Cir 1978) 578 F.2d 319 "establish as the law of this Circuit a bright line test for determining the propriety of EPA's resort to a bubble concept" (Chev.Pet., Appx. A, p. A-16). That bright line test, the court asserts, is as follows:

> "The bubble concept, *Alabama Power* declares, is mandatory for Clean Air Act programs designed merely to maintain existing air quality; it is inappropriate, both *ASARCO* and *Alabama Power* plainly signal, in programs enacted to *improve* the quality of the ambient air" (Chev.Pet., Appx. A, p. A-16; emphasis added).

In fact, there is no support in either the provisions of the Clean Air Act, its legislative history, or the *ASCARCO* and *Alabama Power* cases[7] for such a bright line test.

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[7]In fact, it is widely acknowledged, except by the court below, that *Asarco* and *Alabama Power* are irreconcilably in conflict:

II. THE EPA REGULATIONS IN QUESTION SIMPLY CONFORM THE REGULATORY DEFINITION OF "STATIONARY SOURCE" TO THE DEFINITION SET FORTH IN THE CLEAN AIR ACT.

The Clean Air Act provides no support for the ruling below. The bubble concept, and the EPA regulations implementing that concept in nonattainment areas, are entirely consistent with the provisions of the Act. Section 172(b)(6) of the Clean Air Act requires that the states establish permit programs "for the construction and operation of new or modified major stationary sources" (Chev.Pet., Appx. C, p. C-28; 42 U.S.C. § 7502(b)(6)) in nonattainment areas. For purposes of the nonattainment provisions of the Act in issue here, "[t]he terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 111(a)(4) of this Act" (91 Stat. 746; Chev.Pet., Appx. C, p. C-28; 42 U.S.C. § 7501(4)). Section 111(a)(4) of the Act defines "modification" as: "any physical change in, or change in the method of operation of, a *stationary source* which increases the amount of any air pollutant emitted by such source or which results in the emission of

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"'*ASARCO* and *Alabama Power* reach opposite conclusions, *interpreting an identical definition* of source but coming to completely different determinations about the validity of the bubble concept. No clear reason emerges from the opinions to explain the differences. Because the D.C. Circuit failed to reexamine *ASARCO* in light of its conclusions in *Alabama Power*, and instead tried to distinguish it, the two decisions leave no clear holding on the validity of the bubble concept'" (An Overview of the Bubble Concept (1982) 8 Colum.J. Envtl.L. 137, 151; emphasis added; see Rhinelander, The Bubble Concept: A Pragmatic Approach to Regulation under the Clean Air Act (1981) 1 Va.J.Nat.Resources L. 177, 215; Landau, *Alabama Power Co.* v. *Costle*: An End to a Decade of Controversy over the Prevention of Significant Deterioration of Air Quality? (1980) 10 Envtl.L. 585, 626).

any air pollutant not previously emitted" (Chev.Pet., Appx. C, p. C-27; 42 U.S.C. § 7411(a)(4); emphasis added). The term "stationary source" as used in § 111(a)(4) is itself defined in § 111(a)(3): "The term 'stationary source' means *any building, structure, facility, or installation* which emits or may emit any air pollutant" (Chev.Pet., Appx. C, p. C-27; 42 U.S.C. § 7411(a)(3); emphasis added).

The 1981 regulations in question here simply conformed EPA's definition of stationary source to the statutory provisions of the Clean Air Act by defining stationary source as "any building, structure, facility, or installation," *the precise definition in section 111(a)(3) of the Act* (see 46 Fed.Reg. 50771 (Oct. 14, 1981); 40 C.F.R. §§ 51.18(j), 52.24(f)). The prior, 1980 regulations had further defined the term "installation" as "an identifiable piece of process equipment"—*a definition which appears nowhere in the Act* (45 Fed.Reg. 52746 (Aug. 7, 1980)). In 1981, EPA simply repealed its prior short-lived regulations defining "installation" as an identifiable piece of process equipment (46 Fed.Reg. 50766 (Oct. 14, 1981)).

Certainly, in so conforming the definition, EPA could not have committed a per se violation of the Act as the court of appeals held. In any event, EPA acted rationally, reasonably, and well within both the terms of the Act and its agency discretion in promulgating the 1981 regulations. Nothing in the Clean Air Act suggests—much less requires—that EPA should define "stationary source" so as to require permits for each individual piece of equipment in a plant.

III. THE EPA REGULATIONS IN QUESTION ARE IN ACCORD WITH THE LEGISLATIVE HISTORY AND PURPOSES OF THE CLEAN AIR ACT.

The legislative history of the Clean Air Act does not directly address the definition of stationary source or the use of the bubble concept (Chev.Pet., Appx. A, p. A-17, n. 39). The legislative history does establish, however, that the bubble concept is consistent with the purposes of the nonattainment provisions of the Act.

Congress clearly and unambiguously stated that the nonattainment provisions of the Act have

> "• • • two main purposes: (1) to allow reasonable economic growth to continue in [a nonattainment] area while making reasonable further progress to assure attainment of the standards by a fixed date; and (2) to allow States greater flexibility for the former purpose than EPA's present interpretative regulations afford" (H.R.Rep.No. 294, 95th Cong., 1st Sess., p. 211 (1977)).[8]

[8] That this is the relevant legislative history is made clear by the Conference Report; the permit program for new and modified sources in nonattainment areas was taken from the House Bill (H.R.Rep.No. 564, 95th Cong., 1st Sess., p. 157 (1977); 1977 U.S.Code Cong. & Admin. News, p. 1537).

Respondents misstate the relevance of the legislative history of the House Bill (Respondents' Br. in Opp. to Pets., p. 16, n. 31). Chevron does not claim that the above-quoted passage "chang[es] the basic 'source' definition" (ibid.); the legislative history is significant, however, to establish that the bubble concept is consistent with the purposes of the nonattainment provisions. The suggestion that the purposes of allowing reasonable economic growth and allowing states greater flexibility apply only to two specific aspects of the nonattainment provisions is simply incorrect. Respondents' reliance upon the "pages of the Report which follow" the above-quoted statement of purposes is misplaced, as those pages similarly state that a purpose of the nonattainment provisions "is to give the States more flexibility in determining how to protect public health while still permitting reasonable new growth" (H.R.Rep.No. 294, 95th Cong., 1st Sess., p. 213 (1977)).

Had the court of appeals considered whether the bubble concept is consistent with those purposes, the uncontroverted factual record before EPA and the court of appeals would have shown that the bubble concept will not contravene or in any way impede those objectives.

The bubble concept affords the states flexibility: In some states, where automobile emissions rather than stationary source emissions prevent the state from meeting Federal air quality standards, use of the plantwide bubble concept is irrelevant to attainment of those standards.[9] The bubble concept would enable these states to reallocate their resources to automobile emission control, rather than waste limited regulatory resources on inspection and the issuance of permits for each and every piece of industrial equipment in nonattainment areas under a "dual definition." States are anxious to demonstrate that use of the bubble concept is fully consistent with timely attainment of air quality standards in the most expeditious and cost-effective manner.[10] But the ruling below precludes any state from using the bubble concept, regardless of whether that concept suits its needs.

In the San Francisco Bay Area, for example, control of pollution from automobiles, rather than from industry, is the key to effective air quality control (J.A. 165-166). The Bay Area Air Quality Management District has promulgated permit rules which, while stringent (J.A. 163), are

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[9]See e.g., comments of the Arizona Department of Health Services (J.A. 136).

[10]See, e.g., comments of the California Air Resources Board (J.A. 154-155); Ohio Regional Air Pollution Control Agency (J.A. 120); New York State Department of Environmental Conservation (J.A. 128-129); Missouri Department of Natural Resources (J.A. 130); Ohio EPA (J.A. 138).

easy to enforce because they allow industry to offset emission increases in one sector of a plant with decreases in other sectors (Feldstein Decl., Exh. A, p. 2-2-6). Thus, the District can ensure that a plant's emissions are in compliance with the Clean Air Act, without monitoring and conducting permit proceedings for each and every individual piece of equipment in the plant. Without the flexibility of the bubble concept, for example, the District would be forced to issue a separate permit for *each* individual piece of process equipment in the Chevron project, which involves construction or modification of scores of furnaces, reactors, exchangers, filters, compressors and cooling towers (see Feldstein Decl., Exh. B, p. 2). The resulting drain on the limited administrative resources of the District would be enormous. Moreover, conducting permit proceedings for individual pieces of equipment is simply unnecessary since local districts could, under the bubble concept, fashion regulations which result in net *reductions* in emissions from all plant modifications or expansions (J.A. 164).[11]

It should also be noted that the decision below, by precluding state flexibility, violates the principles expressed by this Court in *Train* v. *Natural Resources Def. Council* (1975) 421 U.S. 60. In *Train*, this Court recognized that the

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[11]The Bay Area Air Quality Management District, for example, has promulgated permit rules which allow maximum emissions from the modified facility based on the actual emissions from the old facility, averaged over a period of years, or "baseline" (J.A. 164). Thus, the "baseline" emissions set a ceiling for emissions from the modified facility, which may operate at or below the baseline average emissions from the old facility, but never above that level (ibid.).

states have the primary role in determining the specific emission limitations necessary to meet national standards (421 U.S. 79).

> "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation" (421 U.S. 79).

But the decision below bars all use of a plantwide definition implementing the bubble concept, even where a state demonstrates that use of the bubble concept will not impede timely attainment of air quality standards.

Moreover, the bubble concept is consistent with Congress' goal of allowing reasonable economic growth while the states make reasonable further progress to attainment of Federal air quality standards. The bubble concept encourages modernization and expansion of industrial plants, and "reasonable further progress" is assured because the EPA regulations in question allow construction of major stationary sources or major modifications only if the state has demonstrated to EPA that its air quality plan assures reasonable further progress toward meeting air quality standards (Chev.Pet., App. C, p. C-29; 40 C.F.R. § 52.24).

The application of the bubble concept to Chevron's Richmond Lube Oil Project demonstrates the importance of the concept to effective air pollution control. Chevron's project is being constructed in Richmond, California, an area in which the air quality already meets all primary Federal standards (J.A. 159).[12] The Richmond Lube Oil

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[12]The area remains classified a "nonattainment" area for two pollutants because of *past* pollution levels.

Project will result in net *decreases* in emissions into the air from Chevron's refinery (J.A. 165). The decreases in emissions result from the construction of new lube oil processing equipment which will totally replace old, poorly controlled equipment which was installed in the late 1930's (Feldstein Decl., Exh. B, p. 5). The modification and replacement of equipment in Chevron's project will reduce emissions by:

80 tons per year of organic compounds (precursors to photochemical smog);
199 tons per year of sulfur dioxide;
67 tons per year of nitrogen oxides;
48 tons per year of carbon monoxide;
18 tons per year of particulate matter
(Feldstein Decl., Exh. B, p. 3).

The Richmond Lube Oil Project will also use the "best available control technology" to minimize emissions (J.A. 158), and the Bay Area Quality Management District has issued a permit with conditions imposing stringent sanctions if the plant's emissions ever exceed the limits set forth in the permit (Feldstein Decl., Exh. B, p. 6).

Projects like the Richmond Lube Oil Project are essential to continued economic growth. Chevron's project in the Bay Area involves costs in excess of $500,000,000, will generate 1,200 construction jobs and 45 permanent jobs, and will process 30,000 barrels of oil per day. In contrast to the economic growth allowed by the bubble concept, the ruling below results in a stifling of economic growth, contrary to the express goals of Congress. The Clean Air Act requires a construction moratorium in nonattainment areas

without EPA-approved plans, but the terms of the Act apply that moratorium only to "major stationary sources" with emissions increases above threshold levels established by statute. The ruling below, however, will result in a moratorium on expansions or modifications of plants with net emission increases *below those threshold levels.*[13] By prohibiting all use of the bubble concept in nonattainment areas, the court of appeals has extended the construction moratorium to projects in which a proposed piece of equipment or unit within a plant would increase emissions, even if the expansions or modifications to the plant as a whole would not exceed statutory limits or would result in net *decreases* in emissions. These industrial projects will simply not be constructed if the ruling below is allowed to stand.

In holding that EPA may not promulgate regulations using the bubble concept, the court of appeals has substituted its judgment for that of EPA on basic policy issues. The court of appeals prohibited EPA from using the bubble concept in nonattainment areas *solely because of the court's policy judgment that the bubble concept would cause unacceptable harm to air quality.* But this policy judgment of the court below is contrary to the judgment of EPA and the judgment of Congress: Under the plantwide definition of "stationary source" in nonattainment areas adopted by

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[13]For example, under the ruling below a refinery owner could not modify its plant if the proposed modification involved an increase in hydrocarbon pollution in excess of 40 tons each year (the de minimis level) for a given piece of equipment; the modification would be precluded even if other components of the modification would reduce pollution by 100 or 1,000 tons each year and result in a substantial net *decrease* plantwide.

EPA a project would be allowed to proceed only if any net emission increase from the plant as a whole is below the maximum levels *allowed by statute*. Thus, any increase in emissions from a plant using the bubble concept is, by definition, of a de minimis amount which *Congress has found to be acceptable and consonant with achievement of attainment in nonattainment areas.*[14] The court of appeals may not second-guess the judgment of Congress in setting the acceptable levels of emissions, nor may the court usurp EPA's judgment in fashioning regulations to meet those levels.[15]

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[14]Contrary to respondents' assertion (Respondents' Br. in Opp. to Pets, pp. 4-5, n. 9), EPA's regulations allow modifications only if the net *cumulative* emission increase is below de minimis levels (40 C.F.R., Part 51, Appx. S, ¶ II.A.6; 40 C.F.R. § 52.24(f)(6)). Respondents' suggestion that a refinery owner could build new storage tanks increasing hydrocarbon pollution by 40 tons each year is simply incorrect. The October 14, 1981 EPA regulations would only allow a total 40-ton increase for the *entire* refinery over a five-year period (ibid.).

Similarly, the permit rules of the Bay Area Air Quality Management District require that *all cumulative increases* in emissions from a given facility of more than 250 pounds per day over a specified period of time *must be offset* in accordance with the permit rules (J.A. 164).

[15]There is no merit to respondents' assertion that the EPA regulations in question will adversely affect public health (Respondents' Br. in Opp. to Pets., pp. 24-26). Those regulations allow a major stationary source to be constructed or major modification made only if the state has demonstrated to EPA that its overall air quality plan for the state assures reasonable further progress toward meeting air quality standards (supra, pp. 2-3). Moreover, under the EPA regulations in question, a project in a state with an unapproved plan would be allowed to proceed only if any net cumulative emission increase from a plant is below the maximum levels which Congress has found to be acceptable (supra, p. 4).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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